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in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

No. 71-1505

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, et al., as and constituting the members of the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND and the BOARD OF EDUCATION of the State of Florida,

Petitioners,

vs.

AEROJET-GENERAL CORPORATION,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

The Petitioners are the Cabinet of the State of Florida, and constitute the membership of the State of Florida's Board of Trustees of the Internal Improvement Trust Fund (hereinafter "Trustees") and the State of Florida's Board

of Education (hereinafter "Board of Education"). They were Defendants in the District Court, and Appellants in the United States Court of Appeals, Fifth Circuit. They will be referred to herein collectively as "Petitioners". AEROJET-GENERAL CORPORATION was Plaintiff in the District Court, and Appellee in said Court of Appeals. AEROJET-GENERAL CORPORATION will be designated herein "Respondent".

References to the record are by Record Volumes bound together as Petitioners' Appendix in this Court. There are three record volumes within the Appendix, which are separately paginated. References thereto will be prefaced by the letter R., followed by the appropriate volume and page number. All emphasis herein is supplied unless otherwise noted.

STATEMENT OF THE CASE

As to the facts which are properly a part of the record herein, Petitioners' Statement of the Case is correct, though incomplete in the following particulars:

On December 21, 1961, Petitioners and Respondent executed a Lease With Option to Purchase (R. Vol. I, pp. 40-47, hereinafter referred to as "Lease-Option" or "contract"). By that instrument, Petitioners leased to Respondent for ten years approximately 25,313 acres of specifically described real estate located in Dade County, Florida and granted Respondent an option to purchase same for $50.00 per acre. (R. Vol. I, pp. 41-42). The Petitioners owned fee title to the land in their respective official capacities.

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Respondent was the high bidder upon the Lease-Option, pursuant to statutory[1] notice of bids and public sale. The Petitioners, having the right to reject this bid,[2] accepted it. Thus ensued the Lease-Option, under which Respondent covenanted (i) to pay annual rental of $2.50 per acre in advance, commencing on the date of execution and continuing each year thereafter, (ii) to pay annually to the appropriate local governmental agencies a sum of money equal to, but in lieu of, the amount of ad valorem real estate taxes which would be owed on the leased lands if Respondent held title thereto (lands owned by state agencies being tax immune), together with any valid special assessments levied upon the property (hereinafter referred to as "in lieu taxes"), and (iii) to commence, within twelve months after execution of the Lease-Option, construction and installation of a manufacturing plant and associated facilities upon the leased lands or upon lands contiguous thereto owned, leased or controlled by Respondent and in so doing to utilize the leased lands in conjunction with the operation of such manufacturing plant and associated facilities. (R. Vol. I, pp. 42-44)

The Lease-Option provided that the lease and the option could be terminated prior to the expiration of the ten year term in the event of Respondent's default in any of the Lease-Option provisions, *upon Petitioners' giving written notice of such default and an opportunity to Respondent to cure any such default* within 60 days of such notice. (R. Vol. I, pp. 35) Further, the contract provided for termination of all lease covenants upon exercise by Respondent of the purchase option, except that a specific covenant against land speculation continued in effect for

[1] *Fla. Stat.* §§ 270.07, 08 (1961)
[2] *Fla. Stat.* § 270.09(3) (1961)

the full 10 year term, regardless of the date of exercise of option. (R. Vol. I, p. 35) *At no time prior to the exercise of the option in September, 1969, did Petitioners ever give Respondent notice of any alleged default under the contract, nor was any declaration of default made by Petitioners during the life of the lease through and including exercise of the option.* (R. Vol. I, pp. 10-12)

To the contrary, during the term of the lease through and including the exercise of option Petitioners accepted the annual rental of $63,272.50 paid by Respondent in advance, for a total rental paid to Petitioners of $506,180.00. (R. Vol. I, pp. 9, 13, 23) Dade County and the State's other governmental arms with ad valorem taxation authority have been paid and have accepted all in lieu tax payments due under the Lease-Option. (R. Vol. I, pp. 9, 10, 13, 23) Respondent complied with its covenant to construct and install a manufacturing plant and associated facilities. (R. Vol. I, pp. 25, 27 R. Vol. II, pp. 7-33) Respondent made a total capital investment for buildings and equipment of $21,200,000.00 (R. Vol. I, pp. 10, 11, 13; R. Vol. II, pp. 10-11, 17) It invested an additional $7,100,000.00 in the purchase of land contiguous to the lease-optioned land, and which together form the entire Aerojet tract. (R. Vol. I, pp. 10, 11, 13, R. Vol. II, p. 10).

As is noted in the certiorari petition (p. 8), the District Court required the parties to submit memoranda on the issues of Petitioners' power to enter into a lease-option and the validity of the notice for bids. In connection with such memoranda, Respondent filed before the District Court certain documents executed by Petitioners, the authenticity and genuineness of which are agreed. (R. Vol. III, pp. 2-207) These forty-five documents are conveyances by the Petitioners of less than the fee interest of lands held by

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them, (e.g., R. Vol. III, pp. 77, 95, 114, 152). They are variously denominated "lease", "easement grant", "permit", "right of way", and "lease-purchase agreement". Some contain "options", e.g., R. Vol. III, pp. 95, 121, 138. They convey interests in realty which are not *specifically* authorized by statute, and the terms of such conveyances are often for many years, some are in perpetuity. (R. Vol. III, pp. 8, 47, 109, 142)

Much of Petitioners' Statement of the Case is concerned with matter not properly in this record. These "facts" have been bootstrapped into the record by means of a procedure Petitioners call "Motion To Remand The Cause With Leave To File Motion To Set Aside Judgment In The Lower Court", filed after the U.S. Court of Appeals, Fifth Circuit, had determined their appeal adversely to Petitioners. No procedural authority for this motion has yet been cited, and the motion was filed after the time permitted by rule for rehearing petitions.[3] Essentially, the motion attempted to secure the Court of Appeals' order directing the District Court to favorably entertain a motion to set aside the judgment which had just been affirmed; and in support of the request Petitioners argued things which were entirely *dehors* the record. In response to the motion, Respondent attached certain other material which is also *dehors* the record, saying:

> . . . We therefore resort to some non-record material ourselves, without contending that the following facts should be any more a part of this record than those asserted by [Petitioners] . . . [I]f [Petitioners] are to be allowed to inject ex-

[3]The Fifth Circuit had extended the time for filing rehearing petition in the cause, but no authority had been given to file this "Motion To Remand, etc."

> traneous matter into the record at this point, and if we are forced to rebut arguments based upon it before this Court and possibly before the Supreme Court of the United States, then candor requires us to state that we want at least to have our own extraneous matter in the record, too. All of it should be stricken, however, for it is all patently improper under the Federal Rules of Appellate Procedure. (R. Vol. III, p. 96)

The Court of Appeals denied the "Motion to Remand, etc." without opinion, and so did not specifically strike or refuse to strike from the record the matter referred to above. To the extent that these post-opinion alleged factual matters are of any significance, the statement of them by Petitioners should be corrected as follows:

Petitioners' assertion that other lands purchased by Respondent, from a private corporation, were "less valuable than" the land involved in the subject Lease-Option, is utterly without support or basis. As Petitioners point out in other parts of their argument, the various parcels involved are as much as thirteen miles apart (Appendix to Petition, p. A 67), and there is nothing in the "Motion to Remand" which even purports to show any disparity in value which is disproportionate to purchase price. Although Petitioners tried to "document" argument made in their motion, all they could manage with respect to relative value of lands was to say that they "believe" there to be a disparity in value. (Appendix to Petition, p. A 65) In any event, the question of land value was considered by the Court of Appeals in its opinion:

> . . . The [Petitioners] presented to the district court no reason to characterize the option pur-

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> chase price as unreasonable or inequitable at the time the lease was executed. We find no reason to suppose that the [Petitioners'] predecessors were so inexperienced or uninformed in 1961 that the present [Petitioners] should be insulated from a decree of specific performance. (Appendix to Petition, p. A 56, 453 F.2d at 833.)

Contrary to Petitioners' assertions, the entire tract acquired by Respondent, including the lands in question here, was acquired for use in connection with proposed solid fuel rocket testing, development and manufacturing facilities. The Land Use Study of the entire tract was attached to our response to the "Motion to Remand", and is in the Appendix to the Petition, p. A 107. Part of the facilities constructed by Respondent are on 960 acres of the lands involved here, which are in the southerly portion of the tract. Most of the balance of the lands involved here are in the northerly portion of the tract. (Appendix to Petition, A89) All the lands are part of a contiguous tract, and the lands which Petitioners say are 9 to 13 miles away from the present facilities are nonetheless contiguous to lands Respondent owns which cover the *entire 9 to 13 miles.* (Appendix to Petition, A89) The Respondent's lands which span the 9 to 13 miles Petitioners talk about *are themselves from one to seven miles in breadth, as well as 9 to 13 miles in length.* (Appendix to Petition, p. A89) In fact, the apparent and sensible explanation for the various land acquisitions is that all the lands were contemplated for use if the solid fuel project developed as expected. This appears from Respondent's Land Use Study. (Appendix to Petition, p. A 109)

Finally, Petitioners for some reason regard as important the issue of the 1968 ad valorem tax valuation of the

test caisson, constructed on part of the lands involved here at an expense of some $2,000,000. (R. Vol. II, p. 17) Petitioners do not dispute the fact of expenditure of $2,000,000 by Respondent in constructing the cast-cure-test facility, or rocket test caisson; they simply say that in 1968, when it was not in use through no fault of Respondent,[4] it stated its value for ad valorem tax purposes for that year to be $77,134. When it is not in use, or when its use is not reasonably expected, the test caisson is simply a very expensive and very specialized hole in the ground. Due to some recent developments, that "hole in the ground" may again become valuable as well as expensive.

In response to some portions of the "Motion to Remand, etc.," Respondent has referred to the recent federal program to develop a space shuttle rocket program, and to use solid fuel, re-usable rockets for propulsion. (Appendix to Petition, p. A99-A100) In fact, the federal agencies involved have determined that solid fuel rockets will be used in the $5.5 billion space shuttle program, and Respondent will be one of the prime bidders on the program. Additionally, it has been announced that the space shuttles will be launched from Cape Kennedy, only a relatively few miles from the lands in question. Thus, the tract acquired by Respondent will be necessary for production of solid fuel shuttle boosters if Respondent is a successful bidder on the project. Needless to say, Respondent would be most pleased to have the opportunity to use the lands in the manner originally contemplated.

---

[4]As noted by the Court of Appeals (Appendix to Petition, p. A37, 453 F.2d at 825):

> The plant was completed in the spring of 1964 and was in operation until June, 1967, at which time it ceased operations *due to cutbacks in the federal government's spending on solid rocket fuel research and development.*

SUMMARY OF ARGUMENT

QUESTION A (RE-STATED)

DID THE COURT OF APPEALS DECIDE AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW WHEN IT RULED THAT THE NOTICE FOR BIDS WAS SUFFICIENT TO SUPPORT AN EXECUTED AND PERFORMED CONTRACT, ABSENT SPECIFIC CHARGES OF ACTUAL FRAUD, MISCONDUCT, FAVORITISM, PREJUDICE OR DISCRIMINATION?

Petitioners have failed to show that this point satisfies the Rule 19, *Supreme Court Rules*, criteria for reviewing decisions of state law made by U.S. Courts of Appeal. In such cases, certiorari will be granted to review a state law question if (1) it is important and (2) the court of appeals has decided it in a way in conflict with applicable state law. These elements necessary for certiorari review must be considered in context of this Court's practice not to undertake review of state law questions when state authority at least arguably supports the decision sought to be reviewed. *Spiegel v. Commissioner*, 335 U.S. 701 (1949); *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Sims v. United States*, 359 U.S. 108 (1959); *Propper v. Clark*, 337 U.S. 472 (1949); *Richards v. United States*, 369 U.S. 1 (1962).

Concerning sufficiency of the notice for bids herein, the Court of Appeals did not even reach the issue which Petitioners argue in support of a state law conflict. The cases argued by Petitioners to the Court of Appeals and

to this Court [*Mayes Printing Co. v. Flowers*, 154 So.2d 859 (Fla.App. 1st 1963); *Robinson's Inc. v. Short*, 146 So.2d 108 (Fla.App. 1st 1962)] involved bid notice requirements used in government *purchases* of specific items. This situation differs from bid notice requirements when government land is offered for sale and development. [E.g., *Jersey City Merchant's Council v. City of Jersey City*, 186 A.2d 684, 691-92 (N.J. 1962)]. The decision below does not rest on this distinction, however.

The Court of Appeals decided the bid notice issue based on a legal principle announced in *Wester v. Belote*, 103 Fla. 976, 138 So. 721 (1931), which deals specifically with cases involving contracts which have been made and entered *before* litigation is commenced attacking the sufficiency of the bid notice. In such cases, including the present case, courts are to indulge every presumption in favor of the validity of a bid notice, where what has been done is the result of a *bona fide* bid effort and no actual fraud, favoritism, prejudice or discrimination is charged.

The Court of Appeals found that all the *Wester v. Belote* elements were present in this case, and so refused to nullify the resultant contract. In doing so, the Court of Appeals simply *applied* Florida law. No conflict with Florida law is apparent or inherent. The decision, though important to this particular case, is hardly a decision of important state law sufficient for this Court to exercise its power to review by certiorari.

QUESTION B (RE-STATED)

DID THE COURT OF APPEALS DEPART EITHER ITS JURISDICTION OR LAWFUL PREROGATIVE IN RULING ON THE POWER OF PETITIONERS TO ENTER A LEASE-OPTION CONTRACT?

Petitioners have not and could not claim that applicable state law is in conflict with the decision of the Court of Appeals on the issue of Petitioners' power to enter into a lease-option. Although there is no case *on all fours*, the Court of Appeals rendered its decision in the context of about 100 years of Florida Supreme Court case law, saying "[a]s a matter both of statutory construction and of good faith and fair dealing, we conclude that the [Petitioners] should not prevail on the issue of authority to grant an option to purchase the land covered by the lease." 453 F.2d at 834.

Essentially, Petitioners ask this Court to issue certiorari and to order abstention or certification of the "power" question to the Florida Supreme Court. The impact of the argument, if it be adopted in this case, would be to destroy the ability of a plaintiff to choose the dispassionate federal forum in diversity cases unless his claim be based on case precedent *which is on all fours with the litigated issues.* Certification or abstention in this case would be an abdication of the duty imposed on the federal judiciary to decide cases presented for adjudication on proper jurisdictional bases. This is *not* a case which fits any category previously announced by this Court as proper for abstention or certification. See, *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Louisiana*

Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943); *United Gas Pipe Line Co. v. Ideal Cement Company*, 369 U.S. 134 (1962); *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960). It is demonstrably *not* encompassed within an "extraordinary and narrow exception to the duty of a [federal court] to adjudicate a controversy before it." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). It *is* an ordinary diversity of citizenship action presenting questions of state law to be decided *in the context of existing state law.*

Petitioners say that their powers over lands held by them are limited to the power to sell and the power in certain circumstances to lease. §§253.02, .45, .47, *Fla. Stats.* Record Volume III consists of 207 pages of conveyances which Petitioners admit they have entered, but which are not *specifically* authorized by the statutes. A number of these leases contain *options* for renewal, and all are indistinguishable from the present contract based on Petitioners' contentions here. (R. Vol. III, pp. 178, 95, 58, 8, 109, 121, 138, 142, 31) Contrary to Petitioners' argument, it is clear that Petitioners statutory powers carry *express and implied* authority for them to exercise general dominion over lands held by them, and "*to make such arrangements for the drainage of swamp and overflowed lands as in their judgment may be most advantageous . . .*" §253.18, *Fla. Stats.; Trustees of the Internal Improvement Fund v. Root*, 63 Fla. 666, 58 So. 371 (1912); *Trustees of the Internal Improvement Fund v. Gleason*, 15 Fla. 384 (1875); *Watson v. Caldwell*, 35 So.2d 125 (Fla. 1948); *Hampton v. Matheson*, 164 So. 714 (Fla. 1936). The Florida Supreme Court has refused to review the actions of Petitioners in dealing with these lands, *except to protect against deprivation of*

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private rights or violation of the Constitution. Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 87 So. 68, 79 (1921) Neither of those situations is present here.

Under Florida law, the aforementioned administrative construction of their powers by Petitioners is entitled to "great persuasive force and efficacy; and a court will not depart from such construction except for the most cogent reasons and unless clearly erroneous." *Green v. Hood,* 120 So.2d 223, 226 (Fla. App. 2d 1960); also, *Gay v. Canada Dry Bottling Co.,* 59 So.2d 788 (Fla. 1952); *United States Gypsum Co. v. Green,* 110 So.2d 409 (Fla. 1959). Especially is this so where, as here, such administrative construction is of long usage. *State ex rel. Fronton Exhibition Co. v. Stein,* 144 Fla. 387, 198 So. 82 (1940); *Green v. Stuckey's of Fanning Springs,* 99 So.2d 867 (Fla. 1958); *Green v. Hood,* 120 So.2d 223 (Fla. 2d Dist. 1960); *Kittel v. Trustees of International Improvement Fund of Florida,* 139 Fed. 941 (N.D. Fla. 1905)

The Court of Appeals also had before it argument and citation of Florida decisions holding that the doctrines of both legal and equitable estoppel have been invoked many times to preclude disavowance by government, its officers and agencies, of a completely void transaction or instrument entered into without authority. E.G., *City of Winter Haven v. State ex rel. Landis,* 125 Fla. 392, 170 So. 100 (1936), *Daniell, et al. v. Sherrill, et al.,* 48 So.2d 736 (Fla. 1950), *Trustees of Internal Improvement Fund v. Bass,* 67 So.2d 433 (Fla. 1953), *Trustees of Internal Improvement Trust Fund v. Claughton,* 86 So.2d 775 (Fla. 1956), *Lobean v. Trustees of the Internal Improvement Fund,* 118 So.2d 226 (Fla.App. 1st 1969), cert. disch., 127 So.2d 98 (Fla. 1961), *City of Naples v. Conboy,* 182

So.2d 412 (Fla. 1965). See also, *Board of Pub. Instruction v. State ex rel. Tanger Inv. Co.*, 121 Fla. 703, 164 So. 697 (1935), *City of Punta Gorda v. Eureka Fire Hose Mfg. Co.*, 117 Fla. 614, 158 So. 128 (1934).

To say that the Court of Appeals "initially construed" the Petitioners' statutory powers is to ignore about 100 years of Florida case law. The Court of Appeals simply decided a contract case in the context of state law. There is an abundance of state law in this area, and it all points clearly to the result which was reached by the Court of Appeals. The case was not and is not a proper one for abdication of federal jurisdiction. It does not involve federal constitutional questions, it does not involve the sovereign prerogative, it does not affect the governmental processes. In Florida, the contract claims of state officers "appeal to the conscience of a chancellor with the same, but with no greater or less force than . . . those of an individual under like circumstances." *Daniell v. Sherill*, 48 So.2d 736, 739 (Fla. 1950), in which the Florida Supreme Court said:

> If we say with Mr. Justice Holmes, "men must turn square corners when they deal with the Government," it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens. *Ibid.*

The Florida Supreme Court has specifically ruled that Petitioners are in a position "which cannot be commended" when they come "into a court of equity alleging want of power and illegality in [their] contracts . . ." *Trustees of the Internal Improvement Fund v. Gleason*, 15 Fla. 384, 397-98 (1875).

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This case, therefore, does not fit within the "extraordinary and narrow exception to the duty of a [federal court] to adjudicate a controversy properly before it" [*Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)] which is known as abstention. This case is clearly governed by *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943):

> . . . the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> *The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. Id*, at 234.

Respondent chose the federal forum to litigate this contract case, because Petitioners are political, elected officials, as are the judges of Florida's state courts. The law of Florida clearly defines the rights of parties who litigate with Petitioners, and Respondent felt obliged to bring this action in federal court to insure that the law of Florida would be dispassionately applied to this case. Certiorari should not be granted at this late date for the purpose of denying Respondent its federal forum.

QUESTION C (STATED BY PETITIONERS)

WAS THE ORDER OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, DENYING THE PETITIONERS' MOTION TO REMAND WITH LEAVE TO MOVE TO VACATE THE DISTRICT COURT'S JUDGMENT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO SUCH AN EXTENT AS TO REQUIRE THE EXERCISE BY THIS COURT OF ITS SUPERVISORY POWERS?

Petitioners seek certiorari to review denial by the Court of Appeals of a "Motion To Remand With Leave To Move To Vacate Judgment." This motion, not authorized or anywhere mentioned in the Federal Appellate Rules, was made at the rehearing petition stage. Certiorari is sought on the ground that denial of this motion was such a departure from the accepted and usual course of judicial proceedings as to require exercise of this Court's supervisory powers. (Rule 19(b), *Supreme Court Rules*)

The supervisory power of this Court referred to in Rule 19 has been exercised in limited circumstances when a lower court has departed from the course of justice in a way which would lead to a lack of confidence in the judicial system if sanctioned. Typical cases involve the admission of tainted testimony in criminal proceedings [*Mesarosh v. United States*, 352 U.S. 1 (1956); *Communist Party of U.S.A. v. Subversive A.C. Bd.*, 351 U.S. 115 (1956)]; perversion of constitutional rights by lower courts such as the right to be free from unreasonable search and

seizure [*Chapman v. U.S.*, 365 U.S. 610 (1961)]; loss of the Seventh Amendment right to a jury trial [*Beacon Theatres v. Westover*, 359 U.S. 500 (1959)]; and total misconstruction of United States statutes [*United States v. Rizzo*, 297 U.S. 53 (1936)]. This Court has utilized the procedure to engage in a sort of judicial fine-tuning. The supervisory power is not used to overturn discretionary judgments made within the bounds of discretion, but rather is used to correct occasional *flagrant abuses of discretion or actual disobedience of law.*

Surely it could not be said that the administration of justice has been "tainted" by the Court of Appeals' denial of the post-opinion "Motion to Remand, etc." The Court of Appeals was abundantly fair to Petitioners to consider the motion, which was in any event addressed to the discretion of the Court of Appeals. Denial of the motion is not ground for exercise of this Court's supervisory power.

The post-opinion "Motion to Remand, etc." consisted of argument on certain alleged "facts" which purportedly demonstrated that (1) the option price for the subject lands supposedly was not sufficient and (2) a large portion of the subject lands supposedly were not intended for use by Respondent in connection with solid fuel rocket development. Petitioners went outside the record to make such arguments. They attached to their motion a variety of documents which are five to ten years old — and which have *all been part of the public records for years.* These documents are themselves hearsay, and are hardly "newly discovered evidence", as alleged. 7 *Moore's Federal Practice* ¶60.23 [4].

Petitioners had 8 months in the District Court between filing and granting of Respondent's summary judgment motion — but no "evidence" of this sort was ever sought to be produced. The Court of Appeals gave Petitioners special leave to bring up new matters at the appellate stage, and though other questions were raised, this so-called "evidence" was not presented until *after* the appellate court's opinion was filed.

Perhaps most important, these "factual" allegations are not true and are not substantiated by the "Motion to Remand, etc." Petitioners have not and could not show that values of the various parcels comprising the entire tract are disproportionate to their various purchase prices. The lands cover many miles, and are of various values. Petitioners only say they "believe" the purchase prices to be disproportionate to value.

The Land-Use Study which Respondent filed in its response to the "Motion to Remand, etc." (Appendix to Petition, p. A107) demonstrates that the entire tract was acquired for use in solid fuel rocket development and production. The recent decision to use solid fuel boosters in the $5.5 billion space shuttle program means that Respondent may soon again have the opportunity to reput all the lands to their long-intended use.

ARGUMENT

QUESTION A (RE-STATED)

DID THE COURT OF APPEALS DECIDE AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW WHEN IT RULED THAT THE NOTICE FOR BIDS WAS SUFFICIENT TO SUPPORT AN EXECUTED AND PERFORMED CONTRACT, ABSENT SPECIFIC CHARGES OF ACTUAL FRAUD, MISCONDUCT, FAVORITISM, PREJUDICE OR DISCRIMINATION?

Petitioners have made the arguments to this Court which they made to the Court of Appeals, but they did not and could not demonstrate that the decision of the Court of Appeals is in conflict with applicable Florida law. Thus, they have not presented a jurisdictional basis for certiorari to issue in this case. It is the rule of this Court, of course, that a state law question will not be reviewed by certiorari unless (1) it is important, and (2) the Court of Appeals has decided it *in a way in conflict with applicable state law.* Rule 19, *Supreme Court Rules.* As a matter of practice, this Court has been loathe to undertake review of state law questions when there is state authority which at least arguably supports the Court of Appeals' decision. *Spiegel v. Commissioner*, 335 U.S. 701 (1949); *Sims v. United States*, 359 U.S. 108 (1959); *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Propper v. Clark*, 337 U.S. 472 (1949); *Richards v. United States*, 369 U.S. 1 (1962).

In deciding that the Petitioners could not avoid their contractual duties because of the form of notice for bids published by them, the Court of Appeals did no more than apply the law of Florida announced in *Wester v. Belote*,

103 Fla. 976, 138 So. 721 (1931). The sufficiency of the notice for bids was not only acknowledged by the lessors in the lease-option,[5] but was conceded by Petitioners in the District Court (See, 318 F.Supp. at 61, 453 F.2d at 826 Appendix to Petition, pp. A15, A40). This concession was repudiated by them in the Court of Appeals.[6] The arguments there made were that (1) the notice for bids did not contain a detailed specification of the manufacturing facility which a successful bidder would be obliged to construct; and (2) the bid condition requiring construction of a manufacturing facility made the offering biddable only by Respondent.

These contentions collide with each other, of course, because if the first were satisfied by specification in the notice requiring a particular testing, development and manufacturing facility for solid fuel rockets, then the problem posed in the second point would be inescapable. The dilemma is inevitably encountered when public agencies must advertise for bids to be submitted for private purchase and development of lands, rather than for the purchase by public bodies of specified goods. The specificity

[5]It provided, in pertinent part (R. Vol. I, p. 33):

"WHEREAS, *all statutory requirements have been satisfied and other necessary action taken, the Trustees* of the Internal Improvement Fund of the State of Florida *and the State Board of Education of Florida*, component state agencies of the State of Florida, *are authorized and empowered to enter into this Agreement* and to authorize its execution.

[6]Cases which Petitioners cite (Petition, p. 8) do not stand for the proposition that succeeding state officers are free to ignore stipulations of predecessors in office. They do stand for the proposition that stipulations of law are not binding on courts. Petitioners cannot renege on the stipulated facts regarding the good faith of the parties in conducting the bid process, a fact crucial to the Court of Appeals' decision. As to the legal questions, it is immaterial whether the stipulation is binding, because the Court of Appeals considered and decided the legal issues.

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required in notices for bids must be different in order to accomplish the purpose of asking for bids, as the Supreme Court of New Jersey has noted:

> However, in the sale of lands, the greater the specificity of the type of improvement, the more restricted is the field of possible purchasers, and hence of competitive bidders. Where the specifications for "the use to be made of such land and any conditions as to buildings or structures to be erected thereon" are reasonably general, the bidding is made attractive to a great number of prospects. Thus, it may be said that competition for the purchase of municipal lands is stimulated rather than stifled in direct proportion to the absence of restrictions affecting future use. Clearly, this is a result that is opposite to what occurs where the municipality seeks bids for a public improvement under general terms and conditions.
>
> * * *
>
> . . . the advertisement created a sufficient common norm or standard. *Jersey City Merchants Council v. City of Jersey City*, 186 A.2d 684, 691-92 (N.J. Sup. Ct. 1962).

Although this factor distinguished the present case from the cases relied upon by Petitioners,[7] the Court of Appeals did not choose to rest its decision on whether the subject notice for bids was either too general or too specific, both of which Petitioners contended were its failures.

[7] *Mayes Printing Co. v. Flowers*, 154 So.2d 859 (Fla. App. 1st 1963), and *Robinson's Inc. v. Short*, 146 So.2d 108 (Fla. App. 1st 1962) both were cases involving the purchase by public bodies of specific goods, and the notices for bids were attacked for undue specificity or undue vagueness.

Instead, the Court of Appeals applied the rule announced in *Wester v. Belote, supra,* which governs cases *in which a contract has already been entered before any litigation is commenced attacking contract validity on grounds of insufficient notice for bids:*

> . . . *it is the duty of the court to indulge in all reasonable presumptions as to* [the notice's] *regularity and validity, especially when the attack made is not on the ground of fraud,* but because of alleged irregularities and uncertainties in the proposals by means of which the contract was finally arrived at. (138 So. at 725)
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> • • •
>
> But it by no means follows that a competitively awarded contract must in every instance be set aside, and payments under it enjoined, at the suit of a citizen and taxpayer, because of insufficient specifications embraced in the advertisement for bids *where what has been done by the board appears to have been done as a result of a bona fide effort* on the county commissioners' part *to comply with the statute, and no actual fraud, misconduct, favoritism, prejudice, or discrimination is charged with reference to the transactions as completed.*" (Id, at 726).

The Court of Appeals did not alter the test required under Florida law; it did not construe the rule of *Wester v. Belote;*[8] it did not create or interpret any exception to Florida law on bid notices. The Court of Appeals simply noted that the criteria present in *Wester v. Belote,* and which resulted in approval there of the contract notice, were also present in this case. A contract had been entered

[8] 103 Fla. 976, 138 So. 721 (1938)

after notice for bids was published. There was no claim of actual fraud, misconduct, favoritism, prejudice or discrimination. Accordingly, the Court of Appeals resolved the point as *Wester v. Belote* compelled. (Appendix to Petition, A60-A61, 453 F.2d at 835-36).

No conflict with Florida law is apparent from the Court of Appeals' decision, and no conflict inheres in it. The decision of the Court of Appeals on this point does nothing except bind Petitioners to obey *this contract*. The decision does not even attempt to define or decide whether a notice like the present one would withstand attack if it had not already resulted in an executed and partially performed contract. Thus, this decision has no bearing on the way in which Petitioners may or may not cast bid notices in the future. It is submitted, therefore, that the notice of bids issue does not present an *important* issue of state law, as that term is used in Rule 19, *Supreme Court Rules*. While the issue is important to resolution of the present case, the limited context in which the question arises makes review of it by this Court unnecessary and unproductive. Accordingly, certiorari should not issue to review this issue. As the Court said in *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 708 (1949):

> It would be wholly unprofitable for us to analyze [state] cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on [state] cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances, we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law.

QUESTION B (RE-STATED)

DID THE COURT OF APPEALS DEPART EITHER ITS JURISDICTION OR LAWFUL PREROGATIVE IN RULING ON THE POWER OF PETITIONERS TO ENTER A LEASE-OPTION CONTRACT?

Petitioners have failed to demonstrate any Rule 19[9] basis for review of the decision below insofar as it deals with their power to enter into a lease-option contract. As noted above, the elements necessary for certiorari review of state law decisions by U.S. Courts of Appeals are: (1) decision of an important question of state law (2) in a way in conflict with applicable state law. [Rule 19(b), *Supreme Court Rules*]

Petitioners have not and could not claim that applicable state law is in conflict with the decision presented here for certiorari review. (Petition for Writ of Certiorari, p. 15-18) The Court of Appeals decided, in context of Florida statutory and case law, that Petitioners have power to enter into a contract of lease-option. This same issue was raised by the District Court, briefed by the parties there, and *conceded* by the Petitioners or their predecessors in office. (R. Vol. II, pp. 43-50)[10] The District Court found

[9] *Supreme Court Rules*

[10] Petitioners' counsel stated:

2. *Lease With Option to Purchase*

As admirably reasoned and documented by plaintiff (pp. 1-8, plaintiff's Memorandum of April 6, 1970) the Board of Trustees of the Internal Improvement Trust Fund is and has been statutorily empowered to sell and to lease such realty as the subject property. The Board of Education is and has similarly empowered (pp. 8-10, *ibid*). The conjunction of the powers is neither prohibited by law nor inconsistent with the statutory and judicial authorities . . . (R. Vol. II, p. 45)

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that Petitioners possess power to lease-option. 318 F.Supp at 61. The issue was again raised by Petitioners' counsel when leave of the Court of Appeals was sought and granted for additional briefs. (See p. 9, Petition for Writ of Certiorari.) It was resolved by the Court of Appeals' decision that "[a]s a matter both of statutory construction and of good faith and fair dealing, we conclude that the [Petitioners] should not prevail on the issue of authority to grant an option to purchase the land covered by the lease." 453 F.2d at 834

Petitioners do not claim that the Court of Appeals' ruling on this issue is in conflict with Florida law; rather, they say the issue is open to question, and ask this Court to issue its writ of certiorari, and then to certify this issue to the Florida Supreme Court. Petitioners have never before made a motion for certification of this question to the Florida Supreme Court; they never alluded to the certification procedure until *after* the Court of Appeals had decided the issue favorably to Respondent. (Petition for Rehearing, p. 6)

Essentially, Petitioners say that this case should be certified to the Florida Supreme Court because there is no Florida case *squarely on point* deciding that Petitioners' powers include the power to enter into a lease-option contract. The impact of the argument, if it be adopted by this Court, would be to destroy the ability of a plaintiff to choose the more dispassionate federal forum in diversity

cases unless his claim be based on case precedent *which is all all fours with the litigated issues.*[11]

Certification or abstention in this case would be an abdication of the duty imposed on the federal judiciary to decide cases presented for adjudication on proper jurisdictional bases. This is *not* a case in which constitutional adjudication depends upon unresolved state law questions, as were the cases upon which Petitioners rely. *United Gas Pipe Line Company v. Ideal Cement Company*, 369 U.S. 134 (1962); *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960). It is demonstrably *not* encompassed within an "extraordinary and narrow exception to the duty of a (federal court) to adjudicate a controversy before it." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). It is an *ordinary diversity of citizenship action* presenting questions of state law to be decided *in the context of existing state law.* The effect of Petitioners' argument on this point would be to deprive the plaintiff of a federal forum whenever plaintiff cannot cite a state case on all fours. Another important aspect of Petitioners' theory is that a diversity defendant should be allowed to resort to this tactic *after losing the case in the District Court and Court of Appeals without uttering a word about certification or abstention.*

If there could be a case suitable for the exotic procedure Petitioners seek, it most certainly is not this one. In deciding the "power to lease-option" issue, the Court of

[11]A virtually identical request, involving the Florida certification procedure, was denied by this Court in *Intercontinental Promotions, Inc. v. Miami Beach First National Bank*, —— U.S. ——, 30 L.Ed. 2d 89 (1971), *reh den.* —— U.S. ——, 30 L.Ed 2d 297 (1971). The question presented there, according to Law Week, was: "Should federal court in diversity action initially consider and interpret Florida state statute prior to consideration thereof by Florida state courts even though procedural machinery exists to obtain ruling on state law from state's highest tribunal?" 40 U.S.L.W. 3096.

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Appeals: (1) decided an ordinary contract case by following the principles evident from almost 100 years of Florida decisions in this legal area, and (2) decided, as it was obliged to do, an *Erie* question presented in a diversity case, brought in federal court by a plaintiff who resorted for good reason to a dispassionate forum. Examination of Florida law will demonstrate the validity of the first statement; and review of the crazy-quilt pattern this litigation has taken from the start should prove the second.

The "Power" Issue Was Decided In Context of Florida Law

Petitioners contend that their powers as Trustees of the Internal Improvement Trust Fund of Florida, and as constituent members of the Board of Education of Florida, are limited with respect to lands held by them to the power to sell the lands outright. They say that an option contract is outside their powers over lands held by them because (1) the statutes do not specifically grant the power to option land and (2) an option contract improperly imposes restriction on the power of subsequent elected officers to deal with the lands. (pp. 16-18 of Petition for Writ of Certiorari.)

To make this argument, Petitioners have extracted from Chapter 253, *Fla. Stats.*, those words appearing in §253.02, which empower the Trustees to "sell and transfer said lands to the purchasers and receive payment for the same, * * *" Petitioners say that there has been passed no legislation authorizing them to lease lands except as appears in §§253.45, 253.47, et seq., *Fla. Stats.* Petitioners agree that they have entered into leases which are not authorized by these specific leasing statutes, and that they have entered into lease contracts containing *options* to renew leases. (R. Vol. III, pp. 178, 95, 58, 8, 109, 121, 138,

142, 31.)[12] Nonetheless, Petitioners contend that they have no power to enter into *this* option. At no time have Petitioners tried to explain or distinguish other "unauthorized" land dealings from this so-called "unauthorized" option.

The theory of Petitioners' argument here and in the Court of Appeals that the Trustees and Board of Education were without power or authority to grant an option to purchase lands owned by them was that the grant of an option would "tie the hands" of successor-boards so that no sale of such lands could be made by them. But this "logic" is lost when it is considered that leases of such lands for a long term of years or in perpetuity, as the Trustees and Board of Education have been doing for decades, just as effectively precludes such lands from being sold at all, or at least from being sold for as high a price as would be obtainable if the lands were unencumbered by any lease.[13]

In fact, if the only statutory authority for this contract were the power to "sell," Petitioners still would have ample power to convey interests in realty other than fee simple and to use conveyancing devices other than outright sales. "[A] grant of power to sell necessarily carries with

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[12]R. Vol. III consist of 207 pages of conveyances by Petitioners of swamp and overflowed lands which are less than outright sales. They include grants of easements in perpetuity, leases for agricultural, grazing, campsite and airport use, *none* of which are *specifically* authorized by statute. One agreement is entitled "Lease-Purchase Agreement" by which the Trustees agreed with a water management district that certain lands and improvements would be conveyed to the district if and when certain payments were made. R. Vol. p. 31.

[13]The sale of lands by one Board, for that matter, precludes successor-Boards from exercising their power to "sell and transfer." The entire statutory pattern obviously contemplates that Petitioners may exercise dominion over lands in ways which cannot be "undone" by successor boards.

it a grant of power to transfer an interest less than an absolute one."[14]

In Florida, the question was treated in an Attorney General's opinion in 1957. Then Attorney General and now Florida Supreme Court Justice Richard W. Ervin was asked to give an opinion on whether a county, which has the power to "sell and convey" property, may "lease" it, and on what terms. In reply, Attorney General's opinion 057-76 stated:

> "Since we concluded in opinion 052-155, . . . that the power to sell included the authority to lease county property under the same circumstances, it would seem to logically follow that if the board of county commissioners may divest the county of its entire interest in property by the sale thereof, it might enter into a contract of lease for a period of years extending beyond their respective terms of office." Biennial Report of the Attorney General (1957-1958) p. 80.

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[14]43 C. J. Municipal Corporations, §2098 (1927); See *Green vs. City of Rock Hill*, 147 S.E. 346 (S.C. 1929); *Waskey vs. Chambers*, 224 U.S. 564 (1912); *Charles Realty Co. vs. City of Newark*, 10 A.2d 640 (N.J. App. 1945); *Main vs. Mayor etc. of Haggerstown*, 104 Atl. 410 (Md. App. 1918); *Falls County vs. DeLaney*, 11 S.W. 492 (Tex. 1889); *Cf. United States vs. Gratiat*, 14 Peters 526, 10 L.Ed. 573 (1840) (power to "dispose" includes power to lease); *Phelps vs. Harris*, 101 U.S. 370 (1880) (power to "dispose" includes power to exchange); *Hill vs. Sumner*, 132 U.S. 120 (1889); and *Opinion of the Justices*, 73 So.2d 238 (Ala. 1954) (power to "grant" includes power to lease); *Ambrozich vs. City of Eveleth*, 271 N.W. 635 (Minn. 1957); *Black vs. Forsyth County*, 193 Ga. 57, 19 S.E.2d 297 (1942) (power to "direct and control" includes power to lease); *City of Fayetteville vs. Baker*, 176 Ark. 1030, 5 S.W.2d 302 (1928) (power to "control, manage . . . sell" includes power to lease); *Board of Councilmen vs. Pattie*, 227 Ky. 343, 12 S.W.2d 302 (1928) (power to "sell" includes power to lease); *Accord, Burns vs. Moore*, 307 Ky. 167, 209 S.W.2d 735 (1948).

Petitioners acknowledge that the Florida Legislature created the Internal Improvement Trust Fund "to encourage a liberal system of internal improvements in the State of Florida." (Appellants' Supplemental Brief in Court of Appeals, p. 8). If more of it is read than a few words, Chapter 253, *Fla. Stats.*, and the constructions of the Florida Supreme Court demonstrate that Petitioners are and have been empowered to convey such interests in lands held by them as they deem expedient and proper. *Florida's Courts have refused to review the Trustees' acts except for violation of the Florida Constitution or invasion of private legal or equitable rights*, neither of which is claimed by Petitioners. *Everglades Land & Sugar Co. v. Bryan*, 81 Fla. 75, 87 So. 68, 79 (1921).

The portion of §253.02 on which Petitioners rely says the Trustees have power to sell and transfer said lands, and receive payment for same; but the Florida Supreme Court has held that the Trustees have the power to "pledge", "bind", or "appropriate" the lands in order to make arrangements for drainage and development which they judge best, *Trustees of Internal Improvement Fund v. Root*, 63 Fla. 666, 58 So. 371, 378 (1912), where the Court also said that the statutes empowering the Trustees must be construed together to effect the purpose of reclamation. 58 So. at 377. Section 253.18 provides that the Trustees shall "make such *arrangements* for the drainage of the swamp and overflowed lands as *in their judgment may be most advantageous* * * *."

In *Trustees of the Internal Improvement Fund v. Gleason*, 15 Fla. 384 (1875), Gleason contracted for the right to purchase certain amounts of acreage from the Trustees if and when Gleason opened certain ditches.

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Gleason dug the ditches and the Trustees refused to convey the land, a situation remarkably analogous to this case. The Trustees claimed that their contract was *ultra vires*, but the Florida Supreme Court ruled that it was within their power to "make such arrangements" for drainage as they judged advantageous. 15 Fla. at 398-99. It was recognized in *Watson v. Caldwell*, 35 So.2d 125 (Fla. 1948), that the Petitioners' statutory powers carried *implied* terms, for a conveyance not specifically authorized in relation to the Everglades National Park project was there approved on the basis of the *implied* powers of the Board of Education and the Trustees. *Hampton v. Matheson*, 164 So. 714 (Fla. 1936), held that the Board of Education had power to contract to dispose of lands to be acquired by them, *before* receiving title, which essentially gave vendee a purchase option.

The Court of Appeals also had before it argument and citation of Florida decisions holding that the doctrines of both legal and equitable estoppel have been invoked many times to preclude disavowance by government, its officers and agencies, of a completely void transaction or instrument entered into without authority. E.g., *City of Winter Haven v. State ex rel. Landis*, 125 Fla. 392, 170 So. 100 (1936), *Daniell, et al. v. Sherrill, et al.*, 48 So.2d 736 (Fla. 1950), *Trustees of Internal Improvement Fund v. Bass*, 67 So.2d 433 (Fla. 1953), *Trustees of Internal Improvement Trust Fund v. Claughton*, 86 So.2d 775 (Fla. 1956), *Lobean v. Trustees of the Internal Improvement Fund*, 118 So.2d 226 (Fla. App. 1st 1969), *cert. disch.*, 127 So.2d 98 (Fla. 1961), *City of Naples v. Conboy*, 182 So.2d 412 (Fla. 1965). See also, *Board of Pub. Instruction v. State ex. rel. Tanger Inv. Co.*, 121 Fla. 703, 164 So. 697 (1935),

City of Punta Gorda v. Eureka Fire Hose Mfg. Co., 117 Fla. 614, 158 So. 128 (1934).

It was clear from the record that Petitioners had entered and continued to enter into transactions which, according to their theory in this case, would not be permitted. (R. Vol. III, pp. 2-207). This administrative construction of powers, under Florida law, is entitled to "great persuasive force and efficacy; and a court will not depart from such construction except for the most cogent reasons and unless clearly erroneous." *Green v. Hood*, 120 So.2d 223, 226 (Fla. App. 2d 1960); also, *Gay v. Canada Dry Bottling Co.*, 59 So.2d 788 (Fla. 1952); *United States Gypsum Co. v. Green*, 110 So.2d 409 (Fla. 1959). Especially is this so where, as here, such administrative construction is of long usage. *State ex rel. Fronton Exhibition Co. v. Stein*, 144 Fla. 387, 198 So. 82 (1940); *Green v. Stuckey's of Fanning Springs*, 99 So.2d 867 (Fla. 1958); *Green v. Hood*, 120 So.2d 223 (Fla. 2d Dist. 1960); *Kittel v. Trustees of International Improvement fund of Florida*, 139 Fed. 941 (N.D. Fla. 1905).

Thus, Respondent argued to the Court of Appeals that the Florida statutes and cases supported the District Court finding that Petitioners had power to enter the Lease-Option contract [318 F.Supp. at 61], and in the alternative that Petitioners were estopped under Florida law from denying their power to enter the contract [Appellee's Supplemental Brief, pp. 36-50]. The Court of Appeals found that Petitioners' "lack of power" argument was not well taken "as a matter both of statutory construction and of good faith and fair dealing***." [453 F.2d at 834]. In doing so, the Court of Appeals hardly undertook to "initially construe" Petitioners' powers with respect to the

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subject lands. The Florida Courts have been doing so since at least 1875 [*Trustees v. Gleason*, 15 Fla. 384 (1875)]; and the Florida Supreme Court has consistently held that Petitioners' powers are to be construed broadly, and that their actions are not to be reviewed except for deprivation of private rights or violation of the Constitution.[15]

Federal Diversity Jurisdiction Provided Respondent A Dispassionate Forum

Plaintiff chose the federal forum to seek enforcement of its contractual rights, because "federal judges appointed for life are more likely to enforce the . . . rights of unpopular [parties] than elected state judges."[16] Respondent is not a member of any minority group, but its position was clearly in need of dispassionate adjudication in a forum which would apply law and not politics to the case at hand.

This controversy was born in political limelight (R. Vol. II, pp. 6-33), and has been conducted thereafter with the same trappings. After Respondent exercised the purchase option, Petitioners first undertook orally to "void" the contract (whatever that means), at a cabinet meeting. (R. Vol. II, p. 29) The District Court ruled that the contract was not "voided", and was specifically enforceable; the District Court found the equities to be with the Plaintiff there, Aerojet. (Appendix to Petition, pp. A 1-A 25) An appeal was taken, and when the present constituent

[15] *E.g., Everglades Sugar & Land Co. v. Bryan, supra.*

[16] *England v. Louisiana Medical Examiners*, 375 U.S. 411, 427 (1964). Justice Douglas concurring, in an opinion which discusses the various reasons parties choose a federal forum to litigate causes which may include questions of state law.

members of the Petitioners board were elected,[17] the Circuit Court of Appeals permitted additional rounds of briefs. In all, three rounds of briefs were presented to the Court of Appeals. The present Petitioners, when presenting supplemental briefs, doubled back on concessions made by their predecessors, and even contended that their predecessors acted without or in excess of legal authority. When they lost in the Circuit Court of Appeals, Petitioners dredged up and injected into this record voluminous hearsay documents from which they began arguing that Respondent had put something over on their predecessors in office by entering the lease-option.

Petitioners' implications and accusations are unwarranted, prejudicial and offensive, but they nevertheless have been made with reckless abandon. The entire case has been a political football, and Respondent has been abused everywhere *except in federal court*. Respondent did not and could not have foreseen the extent to which this would occur, but Respondent *did* foresee the need to seek enforcement of its legal rights in federal court.[18] That foresight has been vindicated, though tested beyond all expectations.

Under these circumstances, this case is not one which is proper for abstention or for certification. The cases Petitioners cite do not stand for the proposition that certiorari should be used by this Court to effect abstention, much less certification to a state court, in cases which deal

[17]Five of seven cabinet members assumed their offices in January, 1970.

[18]Congress recognized many years ago the need to provide such a forum, and was motivated to establish diversity jurisdiction in federal courts. Judiciary Act of 1789, 1 Stat. 73; Friendly, "The Historic Basis of Diversity Jurisdictions, 41 *Harv. L. Rev.* 483.

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only with questions of state law. *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962), cited by Petitioners, involved the constitutional validity of a municipal taxing scheme *vis-a-vis* the Commerce Clause. (369 U.S. at 135). The Court of Appeals ruled on the constitutional issue, and in doing so, interpreted the taxing scheme prior to *any* interpretation by state courts. (*Ibid.*) Based on *its* interpretation of the taxing enactment, the Court of Appeals invalidated the taxing scheme on Commerce Clause grounds.

This Court said: "Wise judicial administration in this case counsels that decision of the *federal question* be deferred * * *." (*Id.* at 135-36.) In the case at bar, *no* federal question is posed,[19] the issues are simply ones of state law. Nor is the Court of Appeals writing on a clean slate, as it were, in deciding the issue of Petitioners' authority to Lease-Option lands. While there is no case precisely holding that Petitioners may enter into lease-options, there are numerous cases which interpret Petitioners' statutory powers and the effectiveness of their disposition of lands held by them, and point clearly to the conclusion reached by the Court of Appeals (See argument *supra*, at pp. 24-33).

In *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), cited by Petitioners, this Court stated that the abstention doctrine was appropriate "where a *federal constitutional question* might be mooted" by an authoritative state court decision of an unresolved issue of state law. (363 U.S. at 212).

[19]Except to the extent that the Court of Appeals' denial of a post-opinion "motion to remand" presents questions of federal appellate *procedure*.

We are aware of no case which requires this Court to grant Petitioners' request that federal jurisdiction now be abdicated. To the contrary, this diversity case for enforcement of a contract must be decided by federal courts upon proper jurisdictional showing. This Court described the scope of abstention in *Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959):

> *The doctrine of abstention*, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, *is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.* Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. Since no exceptional circumstances justifying abstention appear in this case we think the Court of Appeals was correct in holding that the District Court should have adjudicated the respondents' claim.

This Court has sanctioned a federal court's postponement of the exercise of its jurisdiction in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. See, e.g., Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L.Ed.2d 562, 79 S.Ct. 455; Government & Civic Employees, O.C. CIO v. Windsor, 353 U.S. 364, 1 L.Ed.2d 894, 77 S.Ct. 838; Leiter Minerals, Inc. v. United

States, 352 U.S. 220, 1 L.Ed.2d 267, 77 S.Ct. 287; Albertson v. Millard, 345 U.S. 242, 97 L.Ed. 983, 73 S.Ct. 600; Shipman v. DuPre, 339 U.S. 321, 94 L.Ed. 877, 70 S.Ct. 640; Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 93 L.Ed. 741, 69 S.Ct. 606; A.F. of L. v. Watson, 327 U.S. 582, 90 L.Ed. 873, 66 S.Ct. 761; Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 89 L.Ed. 1725, 65 S.Ct. 1384; Spector Motor Services, Inc. v. McLaughlin, 323 U.S. 101, 89 L.Ed. 101, 65 S.Ct. 152; Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 86 L.Ed. 1355, 62 S.Ct. 986; Railroad Com. of Texas v. Pullman Co., 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643. *But there are no federal constitutional questions raised in this case.*" [Also see *Markham v. Allen*, 326 U.S. 490 (1946); *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549 (1946); *Spiegel v. Commissioner*, 336 U.S. 701 (1949).]

It is no solace to Petitioners that they happen to be elected officers of the State of Florida, for *this is not a case which attempts to compel them to exercise any official discretion or policy-making authority.* All Respondent seeks is the performance of clear legal obligations. In Florida, the law is clear that the contract claims of state officers "appeal to the conscience of a chancellor with the same, but with no greater or less force than . . . those of an individual under like circumstances." *Daniell v. Sherrill*, 48 So.2d 736, 739 (Fla. 1950). The Florida Supreme Court went on to say:

> "If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the Govern-

> ment should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Ibid.*

In a case dealing with the authority of the Trustees to enter into a certain contract, the Florida Supreme Court noted:

> A trustee, who comes into a court of equity alleging want of power and illegality in his contracts . . . and who asks the Court, for this reason, to deny relief to a party who alleges performance upon his part, occupies a position which cannot be commended. *Trustees of the Internal Improvement Fund v. Gleason*, 15 Fla. 384, 397-98 (1875).

Thus, it is apparent that an action to enforce a contract Petitioners have entered is recognized in Florida law not to be an action which in any way involves the exercise of sovereign power. In such circumstances, it is not an action which is in any wise similar to those in which abstention has been found proper.

In *Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1954), the validity of County eminent domain action was in issue, and abstention was held improper:

> . . . [T]he fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with "sovereign prerogative" than a State's power to regulate fishing in its waters, Toomer v. Witsell, 334 U.S.

385, its power to regulate intrastate trucking rates, Public Utilities Comm. v. United States, 355 U.S. 534, a city's power to issue certain bonds without a referendum, Meredith v. Winter Haven, 320 U.S. 228, its power to license motor vehicles, Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law. *Id*, at 191-82, parallel citations omitted.[20]

The nature of the duty imposed by law on the federal judiciary to decide diversity cases, even when the going is a little tough, is best exemplified by *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943):

> . . . But we are of opinion that the difficulties of ascertaining what the state courts may here-

[20]In a case decided the same day as *Mashuda*, the Court approved abstention in a situation involving the power of a Louisiana city to expropriate private property. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). (Justice Brennan, joined by Chief Justice Warren and Justice Douglas, dissented; Justice Stewart concurring in the judgment). In *Thibodaux*, the eminent domain statute involved had never been construed in any case even *like* the one at bar. 360 U.S. at 30. In this case, the Florida Supreme Court has been interpreting the power of the Petitioners to exercise dominion over lands held by them for 100 years (see *supra*, at pp. 24-33), including cases in which it was contended or conceded that Petitioners' acts were void or voidable. In this case, unlike *Thibodaux* or *Mashuda*, there is no issue which goes to the power of Petitioners to exercise sovereignty. It cannot be said too often that this is just a contract case. See dissent of Justice Brennan in *Thibodaux*, "There is no . . . possibility of conflict with the State . . . in the ordinary negligence or contract case in which a District Court applies state law under its diversity jurisdiction." 360 U.S. at 35.

after determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, *it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.* Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 618, 80 L.Ed. 920, 924, 56 S.Ct. 600; Risty v. Chicago, R.I. & P.R. Co., 270 U.S. 378, 387, 70 L.Ed. 641, 650, S.Ct. 236; Kline v. Burke Constr. Co., 260 U.S. 226, 234, 235, 67 L.Ed. 226, 232, 43 S.Ct. 79, 24 ALR 1077; McClellan v. Carland, 217 U.S. 268, 281, 282, 54 L.Ed. 762, 767, 30 S.Ct. 501. *When such exceptional circumstances are not present denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.* 320 U.S. at 234-35.

So it is here that the plaintiff's choice of the federal forum, and the purpose of this jurisdictional act, would be thwarted by refusal of this Court to finally put an end to this controversy. No good reason exists to continue the litigation or to shunt it into state courts.

QUESTION C (STATED BY PETITIONERS)

WAS THE ORDER OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, DENYING THE PETITIONERS' MOTION TO REMAND WITH LEAVE TO MOVE TO VACATE THE DISTRICT COURT'S JUDGMENT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO SUCH AN EXTENT AS TO REQUIRE THE EXERCISE BY THIS COURT OF ITS SUPERVISORY POWERS?

Rule 19, *Supreme Court Rules*, indicates "the character of reasons which will be considered" in granting certiorari review, and refers to cases in which a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Petitioners do not cite any cases of this Court for the proposition that denial of a post-opinion motion (which itself is not a procedure contemplated by the federal appellate rules) is such a drastic departure from the ordinary course of judicial proceedings as to require supervision by this Court. Cases in which the Court has issued certiorari to effect supervision illustrate the limited nature of review contemplated by this certiorari ground.

The departure characterized by the rule is such as would lead to a lack of confidence in the judicial system itself, if sanctioned. Typical cases involved the admission of tainted testimony in criminal proceedings [*Mesarosh v. United States*, 352 U.S. 1 (1956); *Communist Party of U.S.A. v. Subversive A.C. Bd.*, 351 U.S. 115 (1956)] perversion of constitutional rights by lower courts such as the right to be free from unreasonable search and seizure [*Chapman v. U.S.*, 365 U.S. 610 (1961)]; loss of the Seventh Amendment right to a jury trial [*Beacon Theatres v. Westover*, 359 U.S. 500 (1959)]; and total misconstruction of United States statutes [*United States v. Rizzo*, 297 U.S. 53 (1936)]. The Court has utilized the procedure to engage in a sort of judicial fine-tuning. It is not a procedure used to overturn discretionary judgments made within the bounds of discretion, but rather a procedure used to correct occasional flagrant abuses of discretion or actual disobedience of law.

> The untained administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *Communist Party of U.S.A. v. Subversive A.C. Bd.*, supra, 351 U.S. at 124.

Surely it could not be said that the administration of justice has been "tainted" by the Court of Appeals' denial of the post-opinion "Motion to Remand, etc." made by the Petitioners. The rules do not contemplate such a procedure, but it was considered by the Court in an abundance of fairness to Petitioners. The motion itself consisted of argument on alleged facts which were *dehors* the record,

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and on numerous assumptions which are not even supported by the motion and its attachments. What the motion amounts to is a request to compel the District Court to exercise its "discretion"[21] again. Implicit in that motion is the fact that the District Court would continue to have discretion to decide the case precisely the way it did at first. The motion, and the petition for certiorari to review denial of it, do not point to *any* legal duty of the Court of Appeals or the District Court to do something which allegedly has been omitted. The unusual thing about the Court of Appeals' decision lies in the fact that they considered the motion at all. Its denial surely cannot be said to taint the administration of justice or drastically depart the ordinary course of judicial proceedings.

No further legal argument should be necessary in opposition to the issues raised in this part of this petition. However, the inflammatory nature of the so-called "factual" basis for the "Motion to Remand, etc.", and for issuance of certiorari to review its denial, compels us to set the record straight.

In the first place, the other lands upon which Respondent secured options to purchase have never been nor could they ever be established to have been "less desirable" than the lands here involved. Moreover, even if such were the case, it does not establish that the price bid for the lands involved in the subject Lease-Option with the Petitioners was "grossly unfair and inequitable." Respondent, as the record reflects, was the higest bidder for the lands owned

[21]When a plaintiff establishes the essential elements of a specific performance claim, the "discretion" of the chancellor is limited. In fact, Florida law says the right to such relief may not be denied. *Sonpayrac v. Lewis*, 112 So.2d 52 (Fla.App. 1959); *Perry v. Benson*, 107 So.2d 213 (Fla.App. 1958); *Humphreys v. Jarrell*, 101 So.2d 401 (Fla. App. 1958).

by Petitioners and/or their predecessors in office and Petitioners were at complete liberty to reject such bid "if the price offered is not satisfactory to those making the sale." Section 270.08, *Fla. Stats.* As the Court of Appeals concluded (453 F.2d at p. 833):

> * * * The defendants presented to the district court no reason to characterize the option purchase price as unreasonable or inequitable at the time the lease was executed. We find no reason to suppose that the defendants' predecessors were so inexperienced or uninformed in 1961 that the present defendants should be insulated from a decree of specific performance.

Even had the existence of such other options to purchase and the conveyances pursuant thereto, *which were long a matter of public record*, been relevant and material upon any issue of inadequacy of purchase price, such evidence was hardly "newly discovered".[22] The same holds true for the 1968 valuation for ad valorem tax purposes allegedly placed on the improvements erected by Respondent upon a portion of the subject lands, the initial cost of which was over $2,000,000.[23] The petition of Respondent for a reduction in tax assessment upon such improvements also is and has been a matter of public record since 1968.[24]

[22]Appendix to Petition, p. A62.

[23]See Statement of Case, *supra*, p. 8.

[24]It is not difficult to understand why the 1968 tax value of the improvements was low, despite their initial cost. There had occurred a cut-back in federal funds being spent in solid rocket fuels after Respondent's manufacturing plant and improvements had been in operation for some time (453 F.2d at p. 831), resulting in non-use of the improvement. The fair market value of a rocket test caisson is not high when rockets aren't being developed or tested. Respondent has two million of its dollars invested in that caisson, though, and the caisson will be of considerable value to Respondent if it is a successful bidder on the space shuttle program.

This cannot detract from the many "equities" recognized by the District Court for decreeing specific performance. 318 F. Supp. at p. 65.

The requisite for concluding that evidence is "newly discovered" is that the failure to produce any such evidence to the lower court must not have been caused by the moving party's lack of due diligence. The evidence must be such as was not and could not by the exercise of due diligence have been discovered in time to present in the original proceeding and it must be of such a material and controlling nature as would probably induce a contrary decision. 7 *Moore's Federal Practice*, §60.23[4]. This so-called "evidence", asserted for the first time by Petitioners in their Motion To Remand, etc." in the Court of Appeals and in their petition for writ of certiorari here, fails to fall within this requisite category. Over eight months intervened between the filing of Respondent's motion for summary judgment and the entry of summary final judgment for Respondent, during which two separate hearings (February 18, 1970 and August 28, 1970) were conducted, without any attempt by Petitioners to present to the District Court any such evidence as that which Petitioners' now characterize as "newly discovered."

Finally, in their petition for writ of certiorari,[25] as in their "Motion To Remand, etc." in the Court of Appeals.[26] Petitioners for the first time assert that Respondent misrepresented a need for all of the subject lands for the purpose of establishing a manufacturing plant and associated facilities to be used in the production activities designed to strengthen the defense posture of this nation. This, they

[25]P. 21, Petition for Certiorari.
[26]Appendix to Petition, p. A66.

assert, must be concluded from the fact that approximately 23,040 acres of the subject lands are located some nine to thirteen miles distant from other of the subject lands on which the manufacturing plant and associated facilities are constructed.[27] However, if rocket engines are to be developed, tested and manufactured, the rockets and rocket fuel must be stored somewhere, and in a fashion mindful of the needs of the government and the safety of the plant workers and the general public. An ordinary, reasonable and prudent rocket builder would undoubtedly provide for himself a place to store rockets and rocket fuel which is safely removed from other volatile material as much as is reasonably possible. Hence, a facility which contemplates various uses of rocket fuel must occupy a large tract of land.

While Petitioners are careful to point out that a large portion of the subject lands are located some nine to thirteen miles from the manufacturing plant and associated facilities, they are not quite so careful to point out that Respondent acquired contiguous sections of land across that very nine to thirteen mile stretch, and which *connect* the subject parcels so that, in fact, the lands in question here are contiguous at all points to other land owned by the Respondent. This is shown by Petitioners own map attached to their "Motion To Remand, etc.,"[28] and it has been apparent in this record at all times from the legal description of the subject lands, which by themselves are in various tracts and not contiguous to each other, though the subject lands are contiguous to other parcels which Respondent owns.

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[27]Appendix to Petition, p. A66.

[28]Appendix to Petition, p. A89.

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Petitioners' insinuation that Respondent acquired the Lease-Option on the subject lands with no intention of using all of such lands in connection with its rocket testing, development and production facilities is simply not true. Respondent had contracts with NASA for the testing and development of both solid[29] and liquid[30] fuel rocket engines. The "260" and "M-1" were contemplated as first and second stage engines for a vehicle capable of reaching the moon. Toward this end, as the Court of Appeals recognized in its opinion, Respondent expended some $21,200,000 for building and equipment for development of solid rocket fuels, $2,000,000 of which was on land leased by Respondent from Petitioners, and the balance invested in contiguous lands owned by Respondent, for which it paid some $7,100,000.[31] This initial, but enormous capital expenditure in solid fuel rocket engine development was made primarily in the southern-most portion of the subject lands and surrounding lands owned by Respondent, but that fact is hardly proof that the balance of the subject lands were acquired for some nefarious reason. As is evident from the response we filed to this motion, the program contemplated by Respondent and NASA of both solid and liquid fuel rocket stages call for all of the property Respondent acquired, both from Petitioners and private parties, and Respondent planned use of such property in its entirety. (Appendix to Petition, p. A107).

Recent announcement of the space shuttle program has renewed and greatly enhanced prospects for use of the Dade tract, including the subject lands, in connection

[29]The "260."

[30]The "M-1."

[31]453 F.2d at p. 825.

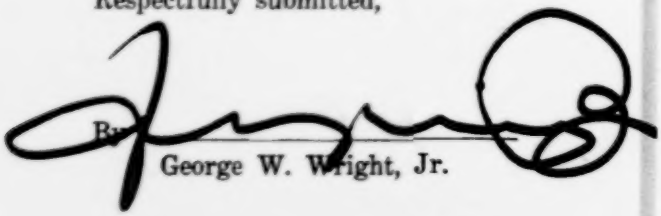
with production of the shuttle vehicle, if Aerojet is a successful bidder. As noted in the Statement of the Case (*supra*, p. 8), the space shuttle vehicles will be propelled by solid fuel, and will be launched from Cape Kennedy. The Respondent's Dade County tract is relatively close to the launch site. The timely announcements concerning the space shuttle demonstrate that Petitioners' endeavors to back out of this contract are shortsighted as well as unlawful.

Certainly, the Court of Appeals' denial of Petitioners' newly-conceived "Motion To Remand, etc." cannot be said to constitute such an extreme departure from the accepted and usual course of judicial proceedings as to render necessary the exercise by this Court of its supervisory powers.

CONCLUSION

For the foregoing reasons, and upon the authorities cited, the Petition for Writ of Certiorari should be denied. The Petition does not demonstrate any ground for reviewing the Court of Appeals' judgments herein, nor is any basis demonstrated for the exercise of this Court's supervisory powers.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the above and foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 30 day of June, 1972 to ROBERT SHEVIN, Attorney General of the State of Florida, Counsel for the Board of Trustees of the Internal Improvement Trust Fund and Counsel for the Board of Education, Petitioners, The Capitol, Tallahassee, Florida and MARION E. SIBLEY, Special Assistant Attorney General, Appointed to Appear for the Petitioners, 605 Lincoln Road, Miami Beach, Florida 33139.

Of Counsel